

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTER

No. 08-200V
Filed: July 8, 2009

NOT TO BE PUBLISHED

MICHELLE BUDDEMEYER,	*	
as Mother and Legal Representative	*	
of her Minor Son,	*	
HAYDEN BUDDEMEYER	*	Fact Ruling; Order.
	*	
Petitioner,	*	
	*	
v.	*	
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

FACT RULING AND ORDER¹

Petitioner, Michele Buddemeyer, filed a Petition for compensation on behalf of her son Hayden. Petition filed Mar. 21, 2008. The Petition alleges that Hayden suffered an encephalopathy from immunizations received on March 30, 2005. In the alternative, the Petition alleges that if it is determined that Hayden suffers from some underlying metabolic or genetic disorder, the vaccines significantly aggravated the underlying disorder. Respondent contests petitioner's right to compensation under the Vaccine Act. The parties supported their respective positions with expert opinions from two highly qualified doctors. However, it became clear to the undersigned that a significant factual issue was enmeshed in the medical dispute. That is, petitioner's expert, who also treated Hayden, based his opinion on the mother's description of Hayden experiencing an immediate reaction to his immunizations. See P Ex 32. The contemporaneous medical records do not document the immediate reaction the mother alleges. Therefore, the undersigned conducted a fact Hearing to resolve this critical factual issue.

¹The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id.

The fact Hearing was conducted on March 31, 2009. Testimony was elicited from petitioner and her mother, Hayden's grandmother. The undersigned has considered that testimony, in conjunction with the entire medical record, and concludes that the contemporaneous medical records correctly and accurately state the factual information to be relied upon in resolving the medical issues presented in this case. Stated another way, to the extent that petitioner alleges factual information not contained in the medical records, that information will not be relied upon in resolving the medical issues. A short explanation of the undersigned's ruling follows.

Petitioner filed the affidavits of herself and Ms. Schwink. P Ex 1 and 2. Both affidavits report immediate and undeniable reactions to the March 30, 2005 immunizations. Ms. Buddemeyer relates that Hayden "started to scream in the store and was inconsolable. It was unrelenting." P Ex 1. She related a pattern of screaming and inability to sleep that continued until Hayden was 14 months old. Id. at 2. She averred that Hayden slowly stopped making eye contact and gradually stopped making sounds. Id. Ms. Buddemeyer reported that she called the pediatrician's office the day of the vaccination and reported Hayden's issues "[o]n all of my future visits to the pediatrician." Id. Ms. Schwink was more succinct, but very clear in stating that after the vaccinations "he was a different child, and our lives changed dramatically." P Ex 2. She confirmed that Ms. Buddemeyer "repeatedly called the doctor's office and took him in for office visits; however, they continued to tell her that his behavior was normal and that he had colic." Id. Both lay witnesses testified consistent with their affidavits. See Transcript of March 31, 2009 Hearing.

The contemporaneous medical records do not support the witness testimony. There are no documented telephone calls by the pediatrician's office immediately following the immunizations, nor are there repeated visits to the pediatrician. See generally P Ex 6; Tr. at 31-2.² In fact, the next visit to the doctor is an emergency room visit on April 10, 2005 because of a "chimney backed up at grandmother's house." P Ex 5 at 37. The next medical visit thereafter was to Dr. Shafrir for "recurrent episode of trembling and suspected seizures." P Ex 7 at 1. These tremors predated the immunizations. See P Ex 6 at 13; P Ex 5 at 37. While Dr. Shafrir records that Hayden is a "demanding baby," the contemporaneous history does not support the dramatic and unmistakable change in Hayden's neurologic condition. Dr. Shafrir records that Hayden wants to be held, has colic, is irritable and sleeps "6-7 hours" at night. Id. He also

² Petitioner did produce cell phone records showing two calls to her pediatrician's office on March 30, 2005. P Ex 34. Petitioner attempted to explain the absence of documented evidence from the pediatrician of the calls by noting that the records only include those calls signed off on by doctors. Tr. at 31-2. Petitioner stated that she spoke to nurses. Id. Reviewing the phone records, see P Ex 6 at 19-36, the undersigned cannot verify petitioner's statement. It appears that the call sheets contain a "staff signature" and a "M.D.[s]" name. Thus, the fact that Ms. Buddemeyer says she spoke to a nurse does not explain the absence of a documented telephonic encounter since the staff is listed on the encounter sheet, the doctor does not always sign the sheet, but is merely identified, see id. at 27, and in some instances the doctor is not identified. Id. at 21, 23.

records that “mother reported to me of some unusual sensory behavior such as crying when she turns on the vacuum cleaner.” Id. at 2. On examination, Dr. Shafrir found Hayden to be a “very healthy looking infant. He was quite active.” While expressing concern that Hayden “was quite late to warm up to me,” Dr. Shafrir did not reach a diagnosis, but indicated that he wanted to see Hayden in three weeks. Id. at 3. Ms. Buddemeyer did not keep the appointment. See id. at 6; Tr. at 27.

The next record is Hayden’s four month well-child visit on June 6, 2005. P Ex 6 at 14. In addition to the developmental assessment being normal, it is recorded under “concerns” that Hayden is “well now/no cough.” Id. Also, under “Reactions to DPT/OPV” it is recorded “none/some crying.” Id. Hayden was given four vaccinations. Id. Hayden was seen again on June 9 for a sick visit. Id. at 15. There is no report of any of the symptoms that petitioner and grandmother allege. Hayden was seen for a follow-up of his infected toe on June 29. Id. at 16. Again, the current allegations are not documented. Hayden was next seen on August 8, 2005 for his six-month well-baby visit. Id. at 17. Under “Concerns” it is recorded “well/no [?] problems.” Id. Under “Reactions to DPT/OPV” it is recorded “none.” Id. Hayden is given another round of immunizations. Id. There is again no recorded concerns as alleged by petitioner in this case.

It is not until September 16, 2005, that petitioner called Honeygo Pediatrics with a complaint of Hayden’s crankiness and sleeping a total of “6-7 hours a day.” Id. at 33. Hayden was evaluated by Dr. Laura Sterni of Johns Hopkins Medicine Mt. Washington Pediatric Pulmonary Clinic. P Ex 9 at 1-2. A detailed history is provided. According to Hayden’s mother, Hayden appears “afraid to sleep,” he is “active and alert ‘all the time,’” and “he fusses and cries for 75 percent of the day.” Id. at 1. In addition, she expresses a concern about his development. She stated to the doctor:

Hayden appeared very developmentally advanced. She states that he had 3 words prior to 2-1/2 months but has been concerned because he has not had new words since then. She states that he has been babbling. She felt that he was standing and pushing up at 5-1/2 months. She reports that Hayden had a history of slow growth early in his life but that she feels that this is due to the milk allergy, and after changing his formula, his growth improved. She also reports that he had episodes of his arm shaking early on, and her primary-care provider referred her to a neurologist. She states that her primary-care provider was also concerned because Hayden did not appear to be gaining milestones appropriately. His mother did not follow through with the neurology evaluation.

Id. Thus, in this detailed history given by petitioner more than five months after the alleged vaccine reaction, petitioner did not report the symptoms of the reactions and resultant harm that are now alleged.

Hayden continued his care at Middle River Family Practice beginning on November 7,

2005. P Ex 8 at 1-79. These records will not be reviewed herein as they add little to the critical onset issue that is the centerpiece of the factual dispute.

Skipping over a number of medical visits related to Hayden's development, Hayden was seen again by Dr. Shafrir on August 23, 2007 - more than two years following Dr. Shafrir's first examination of Hayden. P Ex 7 at 6. Dr. Shafrir did not have Hayden's medical records from Dr. Kinsman, but understood that the diagnosis was PDD. Id. Dr. Shafrir, referencing his May 31, 2005 evaluation, id. at 1, expressed concern about Hayden's development going back to that four month evaluation. Id. at 6. Regarding the issue of the onset of Hayden's problems, which is the subject of this ruling, Dr. Shafrir writes that "[t]he mother is now concerned that the episodes of trembling started after he was vaccinated. His parents are claiming religious exemption and he will receive no further vaccine until he will be seven." Id. at 7. Under "Developmental Regression," Dr. Shafrir wrote:

Hayden suffered dramatic developmental regression. According to the mother, he has lost his language at 16 months. She reported in our autism questionnaire that he was talking already by seven to eight months. I wonder about that. The mother said that he was babbling at seven to eight weeks then stopped and started again at 11 months. The mother reported during the period of regression, I had "constant colics scream and cry nonstop." He had to be held . . . She believes that both episodes of regression at three months and 12 months were followed [sic] vaccination. In both times, the regression was "almost instant."

Id. at 8.

There are additional medical records. However, it is not necessary to discuss them given the ruling on the factual testimony. The essence of the ruling is that the undersigned did not believe that the lay witness testimony was credible. This is not to say that the witnesses lied, but it is clear to the undersigned that their memories of the events are highly questionable. Contemporaneously recorded medical symptoms are frequently accorded more weight by Special Masters than later recounted medical histories, affidavits and oral testimony. Binding precedence supports this approach;

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Cucuras v. Sec'y of HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993)(citing United States v. United States Gypsum Co., 333 U.S. 364 (1947).) The Federal Circuit decision in Cucuras clearly supports the view favoring medical records over oral testimony, especially in situations where there is a conflict between the former and the latter. Id. This is not to say that notations should

be blindly accepted. Medical records are often incomplete or in error.

However, in this case there is no apparent issue with the medical records. The records simply do not contain any concerns expressed by the mother or findings by Hayden's treating doctors that are consistent with the dramatic and unmistakable symptoms occurring immediately following immunization now alleged by petitioner. While the lay witness testimony was that "our lives changed dramatically" from the point of the March 30, 2005 immunization and that the doctor's office was called repeatedly and Hayden was taken in for visits - the records simply do not bear that out. As recounted above, there is no record of any phone call received by the pediatrician and the next visit to his pediatrician was his regular well-baby visit. P Ex at 13. That record expresses no abnormal concerns and notes that Hayden's reaction to his immunizations was "some crying." Id. Hayden was seen in the emergency room on April 10, but this was not related to any alleged vaccine reaction. P Ex 5 at 37. Hayden was also seen by Dr. Shafrir on May 31, 2005, but again there is no history of reaction to his immunizations. P Ex 7 at 1. Ms. Buddemeyer had every opportunity to relate to treating doctors the symptoms that Hayden allegedly suffered following his immunization. Not only is it not recorded that those symptoms occurred, the records indicate the opposite - that Hayden's reactions varied from no reaction to some crying. P Ex 6 at 14, 17. In the face of these clear and unambiguous medical records, it defies logic to accept several years later the allegation of an immediate and severe reaction to the immunizations.

It is interesting to note that Dr. Shafrir states in his expert report that "the entire case stands on the mother's and grandmother's affidavits." P Ex 32 at 11. However, there are signs in Dr. Shafrir's own records of his concerns with Ms. Buddemeyer's information and conflicts with other reported information. Specifically, the mother reported to Dr. Shafrir at the August 23, 2007 visit that Hayden lost his language at 16 months. P Ex 7 at 8. She also reported that he was talking already by "seven to eight months." Id. Dr. Shafrir commented in his evaluation that "I wonder about that." Id. The undersigned interprets that comment as questioning this historical information. Further, if you compare that passage to Ms. Buddemeyer's affidavit and the other histories contained in the medical records, there is good reason to question Ms. Buddemeyer's historical observations. Ms. Buddemeyer states in her affidavit that Hayden gradually stopped making sounds and "[b]y about five months of age he did not coo, babble or attempt vocalization or repeating." P Ex 1 at 2. At the August 15, 2006, assessment at the Baltimore County Infants and Toddlers Program, Ms. Buddemeyer "reported that Hayden began talking between 7 weeks and 3 1/2 months and was using the following words; "Uh-oh," "hi" and "Mama." She reported that he had lost words as well as sounds." P Ex 12 at 6. For the history at Hayden's evaluation at Kennedy Krieger Department of Occupational Therapy on September 20, 2006, Ms. Buddemeyer gave the history that Hayden started talking at seven weeks "but experienced later regression." P Ex 8 at 81. However, on November 15, 2006, she stated at the Kennedy Krieger Institute Center for Development and Learning's initial evaluation that at three weeks of age Hayden "was saying momma and uh-oh appropriately and was repeating vowel sounds." P Ex 11 at 2. However, at "somewhere around 13 weeks of age, all of these sounds stopped." Id. Ms. Buddemeyer's testimony on this issue was extremely general. She stated that

“over the next couple of weeks” following Hayden’s vaccinations, he “didn’t babble or coo much.” Tr. at 19. This testimony would appear to conflict with histories that she gave reporting that Hayden was saying words at 3 ½ months and “seven to eight months.” Her testimony also conflicts with Hayden’s four month well-baby visit where it is noted that he both vocalizes and coos. P Ex 6 at 14. Also, the records saying “all sounds” stopped at 13 weeks conflict with the history given to Dr. Shafrir that Hayden “lost his language at 16 months.” Thus, just with this singular trait of speech, it is clear that the date Hayden began to talk and when he stopped talking is a moving target. The undersigned details this point not to denigrate the fact witnesses, but to highlight the importance of relying upon information given to the treating doctors, including Dr. Shafrir, at the time of the events in question and to point out the significant issues related to petitioner as a historian.

As Dr. Shafrir states “[t]he thing that is missing is the description in the contemporaneous medical records describing the acute encephalopathy. However, I do not believe that there is anything in the medical records which refute what the mother is telling us.” P Ex 32 at 10. While the undersigned agrees completely with the first part of that statement, the second part is highly questionable. The pediatric assessments from Honeygo contain notations that indicate there were no reactions to the immunizations, P Ex 6 at 17, or just some crying. Id. at 14. The records also indicate that the child was “well.” Id. Also, it is highly questionable that on May 31, 2005 Dr. Shafrir saw a child that suffered an acute reaction to a vaccine on March 30, 2005 and reports neither a history of that acute reaction or clinical findings of the same.

The above discussion makes it clear that the medical records must be relied upon for the facts of this case. In addition to the issues discussed above, the undersigned had several other concerns regarding the quality of petitioner’s testimony. To avoid “piling it on” petitioner, these will be summarized. While discussing the cell phone log, it was noted that petitioner checked her voice mail five minutes after calling the pediatrician. Tr. at 13. This was five minutes after Hayden was screaming like he was “stabbed over and over.” Id. at 10. The timing of that call given the alleged distressed state of Hayden is very hard to understand. Likewise is a call to Dr. Shafrir five minutes after the second call to the pediatrician. See P Ex 34 at 2. Petitioner testified that this call was to schedule Hayden’s appointment with Dr. Shafrir. Tr. at 15. It is virtually impossible to rationalize a frantic parent caring for a screaming child with a parent that takes the time to check her voice mail and to schedule a doctor’s appointment.

Likewise, it is extremely difficult to reconcile Ms. Buddemeyer’s claim that she “made phone calls to the doctor’s office all the time,” tr. at 19, with the absence of even a single telephone record of a call discussing the alleged reaction. See P Ex 6 at 19-36. Similarly, Ms. Buddemeyer stated that she went to the doctor’s office because of Hayden’s reaction. Tr. at 19. Again, there is no record of any visit. See P Ex 6 at 13-14. She claimed that she told the doctor at the June 6, 2005 visit of Hayden’s reaction. Tr. at 21. That record notes that Hayden is “well now” and cried some after his immunizations. P Ex 6 at 14. She also claims to have told Dr. Shafrir of Hayden’s reaction. Tr. at 68. Not only is the reaction not noted in Dr. Shafrir’s records, Dr. Shafrir states in his expert report that “[t]he thing that is missing is the description in

the contemporaneous medical records describing the acute encephalopathy.” P Ex 32 at 10. The undersigned has considered the lay witness testimony and finds it not credible. Thus, as stated above the contemporaneous medical records must be relied upon for the facts of this case.

Accordingly, petitioner shall have Dr. Shafrir reconsider his expert report in light of this Factual Ruling. Dr. Shafrir stated in his expert report that “the entire case stands on the mother’s and grandmother’s affidavits.” P Ex 32 at 11. Those affidavits have now been rejected. Thus, it is unclear whether Dr. Shafrir will maintain his opinion that the DPT immunization caused Hayden’s alleged progressive encephalopathy. Id. at 12. Accordingly;

-Petitioner shall **file within forty-five (45) days, by no later than August 24, 2009**, a supplemental expert report or a status report detailing petitioner’s progress obtaining a supplemental expert report and a proposed time frame for filing.

-Once petitioner’s supplemental expert report is filed, petitioner shall confer with respondent and contact the court **within ten days** with three proposed dates and times to schedule a status conference.

Any questions regarding this Order may be directed to my law clerk, Catherine Olin, at (202) 357-6343.

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Chief Special Master